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SPECIFIC ENFORCEMENT OF CONTRACTS TO TRANSFER STOCK.

It will be attempted in this essay to indicate with some precision and particularity, those contracts for the transfer of governmental or corporate stocks which are, and those which are not, specifically enforceable. First, of several pre-requisites to their specific enforcement.

Existence of Contract.—Consideration.—Mutuality.—There must be a valid contract. This proposition needs only to be stated to secure assent. It was practically applied in *Oriental Inland Steam Co. (Limited) v. Briggs*, 2 John. & Hem. 625, wherein a contract to accept shares was thought to lack mutuality and a demurrer was allowed to a bill for its specific enforcement. Briggs undertook to accept the shares, if allotted; to pay calls, and to sign the articles. He also paid the deposit. Thereupon the directors “duly allotted to him 150 of the new shares.” He was informed of this by the secretary, who, however, added a condition to the allotment, by which the receipts were to be exchanged for share certificates and the articles were to be signed, in default whereof the shares were to be forfeited to the company. But the court doubted the power of the company so to forfeit the shares, and questioned whether the secretary’s letter of allotment had not imposed a new condition which formed no part of the defendant’s (Briggs’s) offer. The contract was, therefore, held to be of doubtful validity, and specific enforcement refused.

Again, in *Cheale v. Kenward*, 3 DeG. & J. 27, it was objected that there was no valid contract by reason of a lack of consideration as well as of mutuality. Cheale owned 10 shares in a railway upon which he however had not paid anything. He sought specific performance of an agreement by Kenward to take these shares from him and relieve him from liability for them. As to the consideration given by plaintiff, Lord Chancellor CHELMSFORD: "It is said that these shares were worthless, as nothing had been paid, and the whole of the liabilities were still existing, but the shares might ultimately turn out to be worth more than the amount due upon them, and at all events the possibility of their being valuable would be sufficient to constitute an agreement to transfer them a good consideration," and the giving of something of uncertain value, was held to be a good consideration. As to the consideration given by defendant, counsel said it must be something *de hors* the contract, and not a mere liability flowing out of the agreement itself; to which the Lord Chancellor replied: "The consideration on the defendant's part is not the liability arising out of the transfer, but the agreement to undertake the liability on having the shares. * * * The transfer imposes the liabilities impliedly. Then will not the agreement to take upon himself a legal obligation be a good consideration for defendant's promise? The defendant desired to have the shares; he was willing to pay the amount of the liabilities, from which he agreed to exonerate the plaintiff; and that appears to me a sufficient consideration." It was therefore decided that there was sufficient both of consideration and mutuality, and specific performance was decreed. See, also, *Strasburg Railroad Co. v. Echternacht*, 21 Penn. St. 221.

Independence.—The contract must be independent, or if dependent upon another contract, the latter must have been sufficiently performed to make the execution of the former possible. *Burton v. Shotwell*, 13 Bush 272, presents this point. In that case a contract whereby B. agreed to exchange real estate with S. for stock in a corporation which S. and B. and five others had agreed to organize, was dependent upon the execution of the contract to organize the corporation. It was decided that if the corporation was not organized, without the fault of S. or B. a specific execution of the contract between them could not be enforced nor would either be liable in damages to the other for non-com-

pliance. But as S. was held to have defeated the organization of the corporation by his own conduct to have put himself in a position in which he could not comply with his contract with B. by transferring the stock, a specific execution was enforced against him to the extent that he was compelled to accept a compliance on the part of B. and to be liable to him for the value of the stock, which was ascertained by the court and judgment directed therefor.

But where the agreement to transfer the shares forms part of a different contract which is specifically enforceable—*e. g.* a contract to convey real estate—the court will decree a delivery of the stock. This is upon the principle that having acquired jurisdiction for the purpose of specifically enforcing the contract as to the realty, equity will give complete relief by compelling the transfer of the shares: *Leach v. Fobes*, 11 Gray 506; *Bissell v. F. & M. Bank*, 5 McLean 505.

Fraud.—The contract must not be unconscionable or fraudulent. Thus a court of equity will not decree the delivery of a large quantity of the stock of a bankrupt railway company to one who purchases for a merely nominal sum,—in the case in point \$50.—“The court,” said Mr. Justice BRADLEY, “is not bound to shut its eyes to the evident character of the transaction. It will never lend its aid to carry out an unconscionable bargain, but will leave the party to his remedy at law.” *M. & M. Railroad Co. v. Cromwell*, 91 U. S. 645.

But where a company was by its articles of association prohibited from issuing shares below par without the sanction of a general meeting, and one Mendel agreed to purchase 2000 shares in the company at par; and on the same day the board of directors agreed to pay him 4000*l.* in consideration of his services, it was held, on an action brought by the company against Mendel for specific performance of his agreement, that Mendel could not set up the second agreement as part of the first for the purpose of showing that he had been a party to a collusive arrangement by which shares should be issued to him below par, in defiance of the articles of the association, and that, where parts of an agreement are separated, the court will grant piecemeal performance if that appears to have been the intention of the parties. Concerning the collusive arrangement FRY, J., said: “I am asked to hold the two agree-

ments * * * to be parts of one and the same transaction, in order that Mr. Mendel may say that they are beyond the power of the directors to enter into. I decline to do that. I think that where a transaction, taking it in its entirety would be bad, but where the agent of one of the parties to it has colluded with the other party for the purpose of putting the agreement into such a form that the valid part shall be separated from the invalid part, that that which is *intra vires* may be separated from that which is *ultra vires*; in other words that that which is honest and true may be separated from that which is dishonest and false. The principal may say to the other party whom he sues; you have agreed that that which was originally commenced as one negotiation shall result in two separate agreements, and having so agreed I will now take you at your word and I will enforce so much of the agreement as is contained in the valid separate document upon which I sue, and I will leave the other part of the agreement alone:” *Odessa Tram. Co. v. Mendel*, 37 L. T. N. S. 275.

Possibility of enforcement.—Performance and enforcement thereof must be possible. It is well settled that a court of equity will not make a simply nugatory decree, or one which is impossible of performance or enforcement. This principle has been unsuccessfully relied upon by subscribers sought to be compelled to accept shares in joint stock companies. For example. In *New Brunswick, &c., Co. v. Muggeridge*, 4 Drew. 686, it was objected that by subscribing for shares the defendant had only agreed to become a partner and that equity would not decree specific performance of a contract to enter a firm. Lord ELDON, was quoted as saying, in *Hercy v. Birch*, 9 Ves. 357, that “no one ever heard of this court executing an agreement for a partnership when the parties might dissolve immediately afterwards.” But while admitting that a man might withdraw at any moment from a firm and leave it in the same condition as if he had never been a member, and also that the consequence of this would be to render nugatory a decree of the court requiring him to enter the firm, the court denied that a subscriber for shares could so withdraw from a joint stock company. “But supposing,” said the Vice-chancellor “he had signed the written acceptance of shares, what does he mean by saying that he could retire at any moment at his pleasure? He could not by retiring put an end to his shares.

He must either retain the shares or find some other person to become a shareholder in respect of his shares. Assuming that he may transfer them without the leave of the company still the company get the benefit of the shares being held either by the defendant or by his transferee. The effect of decreeing him to perform his agreement would be that the company would obtain the benefit of having some one liable to it for calls on so many shares, and that is a benefit of which it is not in the power of the defendant to deprive the company by retiring from the concern. The fallacy of the defendant's argument is that he calls a joint stock company a *partnership*, and assumes, because in an ordinary partnership, where no term is fixed for its duration, any partner may put an end to the whole business at once and so retire from it, that, therefore, the shareholders in a joint stock company are in the same position, forgetting that it is precisely in this respect that a joint stock company differs from an ordinary partnership. A shareholder in a joint stock company cannot, as an ordinary partner may do, where no term of partnership is fixed, dissolve the partnership and put an end to it ; he can only retire from it by transferring his shares to some other person who shall stand as a partner in his place. Therefore, to make a decree enforcing the contract to accept shares would not be a nugatory decree, and the principle on which the defendant relies does not apply to this case ; for that principle is founded on the supposition that the plaintiffs would derive no benefit from a decree for specific performance." This case appears to conflict with *Sheffield Gas Co. v. Harrison*, 17 Beav. 294, wherein specific performance of an agreement to take shares in a joint stock company was refused on the ground that a decree so to do would be nugatory, since it would be virtually a decree that defendant enter a partnership. But here, according to the terms of the deed of settlement, the subscriber could cease to be a partner within fourteen days.

So, also, in cases where, besides the issuance or transfer of stock, other things are to be done, performance of which the court will not undertake to enforce, a specific decree will be refused. Contracts by which railways are to be constructed to be paid for in stock and bonds, illustrate this proposition: *Ross v. U. P. Railroad Co.*, 1 Woolw. 26; *Danforth v. P. & C. M., &c., Railroad Co.*, 30 N. J. Eq. 12; *Fallon v. Railroad Co.*, 1 Dill. 121.

Especially will specific performance be refused if it is rendered

clearly impossible, as, for example, by reason of the company having no shares, all of them having been allotted and issued : *Ferguson v. Wilson*, 2 Ch. App. 87. Nor will the officials of a company be compelled to issue its stock or bonds after it has become extinct by reason of a charter forfeiture or dissolution of the company by any other means. Indeed an issuance of stock or bonds, after such an event, might render the corporate officers authorizing it liable to severe and ignominious punishment : *Danforth v. P. & C. M. & C. Railroad Co.*, 30 N. J. Eq. 12.

Nor, where shares have all been distributed by the directors, will they be compelled to deliver to a subscriber omitted in the distribution enough of the shares which they have allotted to themselves to make up the number which the subscriber agreed to take. In *Ferguson v. Wilson*, L. R., 2 Ch. App. 87, the prayer of the bill was in the alternative that, if the shares had all been allotted, the directors be decreed to make good to the plaintiff the shares to which he claimed to be entitled or that they might pay damages in respect of being unable to fulfil what the bill insisted was a contract on their part to allot in favor of plaintiff. As to this, Sir G. J. TURNER, L. J., said : "The bill then prays damages in, I may say, a double form. It prays, in the first place, that the directors of the company may, out of the shares which have been allotted them, transfer to the plaintiff those shares which, according to his contention, would have been proper to be allotted to him. What in truth is that but asking for payment of damages by the directors of the company in the shape of a sacrifice of the shares which have been allotted to them instead of the money ? If a man has to make good a certain claim it is just the same thing whether he makes it good by paying a sum of money or by parting with other property to which he has become validly entitled. In truth, therefore, that part of the prayer which seeks the transfer of the shares by the directors is no other than a prayer for damages. There may be cases in which, if there is a trust relation subsisting between A. and B., and B. has taken property under the trust which belongs to A., or ought to have been appropriated to A., the court will compel B., out of the property which he has taken, to make good that of which A. has been deprived. But this is not a case of trust; this is simply a case of contract, as I think between the plaintiff and the company. But if it goes further it is a case of contract between the plaintiff and the other directors. I am

not aware that there is any law of this court which in a case of contract, not raising any question of trust, would put upon a defendant in a suit the obligation of satisfying the claim in the mode in which the plaintiff contends that it ought to be satisfied."

Public policy.—The contract must not be contrary to public policy. An interesting case involving this point is *Foll's Appeal*, 91 Penn St. 434. Foll, in writing, agreed to sell and Greer agreed to purchase fifteen shares of the stock of a national bank. Greer and his friends owned sufficient stock to give them, with these fifteen shares, the control of the bank, to obtain which was the avowed purpose of the purchase of these fifteen shares. Foll, refusing to deliver the stock, Greer sought to compel specific performance of the agreement.

Said Mr. Justice PAXSON: "This case presents some extraordinary features. We have nothing like it in this state since equity powers were conferred upon the courts. * * * While the legal right of the complainant to buy up sufficient of the stock of this bank to control it in the interest of himself and friends may be conceded, it is by no means clear that a court of equity will lend its aid to help him. A national bank is a *quasi* public institution. While it is the property of its stockholders and its profits enure to their benefit, it was nevertheless, intended by the law creating it that it should be for the public accommodation. It furnishes a place supposed to be safe, in which the general public may deposit their moneys, and where they can obtain temporary loans upon giving the proper security. There are three classes of persons to be protected, the depositors, the noteholders and the stockholders. We have no intimation that the bank, as at present organized, is not prudently and carefully managed. The stock, as now held, is scattered among a variety of people and held in greater or lesser amounts. It is difficult to see how the small stockholders, who have their modest earnings invested in it, the depositors who use it for the safe keeping of their moneys, or the business public who look to it for accommodation in the way of loans are to be benefited by the concentration of its stock in the hands of one man, or in such a way that one man and his friends shall control it. Especially is this so when an attempt is made to control it by the use of borrowed capital. The temptation to use it for personal ends in such case is very strong. It is a fact to which we cannot close

our eyes that the financial wrecks of such institutions with which the pathway of the last few years is so thickly strewn are the result, in a great measure, of personal management. This purchase has not even the merit of being an investment on the part of the plaintiff. Where a man buys and pays for stock with his own money it may be regarded as an investment. But when he buys it upon credit, or pays for it with borrowed money, it is a mere speculation. "Were we to affirm this decree I see no reason why we may not be called upon to use the extraordinary powers of a court of equity to assist in miscellaneous stock-jobbing operations. A party who is attempting to make a corner in stock or in any article of merchandise, who had made his contracts with that end in view, might with equal propriety call upon us to decree specific performance thereof. But the decree of a chancellor is the exercise of a sound discretion ; it is of grace, not of right, and will never be made where the equity and justice of a case is not clear. We have no doubt of our duty in the premises. We are of opinion that the end sought to be attained by this bill is against public policy, and for that reason we refuse our aid : *Foll's Appeal*, 91 Penn. St." 484 ; see, however, *Moffatt v. Farquhar*, L. R., 7 Ch. Div. 591 ; *Wilson v. Keating*, 4 DeG. & J. 588.

Possession of stock.—The promisor must have had the stock at the time he contracted to convey it. Because the defendant did not have the stock at the time the contract was made, was one of the reasons given for refusing specific enforcement in *Cuddel v. Rutter*, 5 Vin. Abr. 540.

Remedy at law.—The remedy at law must be inadequate. It is a well established principle of equity that specific performance of contracts relating to personal property will not in general be decreed, for the reason that an adequate remedy in the shape of damages for the breach of such contracts may be obtained by action at law. Applying this principle, courts of equity refuse specifically to enforce contracts for the transfer of certain kinds of stock. Thus in, *Cappur v. Harris*, Bunbury 135, Baron GILBERT, in relation to contracts to transfer South Sea stock, says : "If it be only executory and a man comes to have it carried into execution, there a court of equity will not aid the plaintiff, but leave him to such remedy as he can have by law." In *Cuddel v. Rutter*, 5 Vin.

Abr. 540, 1 P. Wms. 570, specific performance of a contract to deliver South Sea stock was refused because the complainant might "buy of any other person, and be no more out of pocket than if the stock were delivered to him according to the agreement; this differs very much," said PARKER, Ch., "from the case of a contract for lands, some lands being more valuable than others—at least more convenient than others to the purchaser—but there is no difference in stock, one man's stock being of equal benefit and convenience as another's."

Government and railway stocks.—The authorities, with one or two exceptions, agree that contracts relating to government bonds and stocks will not be specifically enforced, such securities being always readily purchaseable upon the monetary exchanges at well known prices. There is however a conflict of opinion as to railway stocks. Mr. Justice MILLER, of the United States Supreme Court, had the question presented to him at circuit in *Ross v. U. P. Railroad Co.*, 1 Woolw. 26. Said he: "The bonds of the United States are stocks within any definition which can be given to that term. They are public stocks—government stocks. The decisions are clear and uniform, that a covenant for their delivery will not be specifically enforced in a court of equity. As to shares in the (Union Pacific) railroad company, I think the rule should be the same; I see no sound reason for any distinction between them and government stocks. They belong to a class of securities which are generally called stocks; they are the subject of everyday sale in the market and the rate at which they are selling are quoted in the public commercial reports, so that their value is as readily and certainly ascertained as that of government stocks. No especial value attaches to one share over another, and the money which will pay for one will as readily purchase another. The damages, then, for failure to deliver any such shares may be awarded at law and be an adequate compensation for the injury sustained."

But some of the state courts have not taken this view. Thus, in *Ashe v. Johnson*, 2 Jones Eq. 149: "Again, it is said equity will not enforce the specific performance of an agreement to transfer or to accept stock. The reply is, that may be so in reference to government stock in England which, like corn or flour, may be

bought for the money, in market, at any time; but the doctrine has no application to railroad stock."

The English authorities hold that contracts relating to railway stock are specifically enforceable. In *Duncuft v. Albrecht*, 12 Sim. 189, the Vice-chancellor said: "Now, I agree that it has been long since decided that you cannot have a bill for the specific performance of an agreement to transfer a certain quantity of stock. But, in my opinion, there is not any sort of analogy between a quantity of three per cents., or any stock of that description (which is always to be had by any person who chooses to apply for it in the market), and a certain number of railway shares of a particular description; which railway shares are limited in number, and which, as has been observed, are not always to be had in the market and, as no decision has been produced to the contrary, my opinion is that they are a subject with respect to which an agreement may be made which this court will enforce."

In one case an English court virtually decreed specific performance of a contract to transfer a public stock—Neopolitan *rentes*. A distinction was taken between the shares of stock and the evidences thereof, a delivery of the latter being decreed. "I am of opinion," said the Vice-chancellor, "that inasmuch as this bill prays a delivery of the certificates which would constitute the plaintiff the proprietor of a certain quantity of stock, the bill in equity will hold; because a court of law could not give the property, but could only give a remedy in damages, the beneficial effect of which must depend upon the personal responsibility of the party. I consider also that the plaintiff not being the original holder of the scrip but merely the bearer, may not be able to maintain any action at law upon the contract, and that, if he has any title it must be in equity." And in the earliest case upon the subject (*Gardner v. Pullen*, 2 Vern. 393), specific performance was decreed of a contract to convey a *quasi* public stock, that of the old East India Company. The case was this:

On March 22d 1696, Pullen lent Phillips three shares of stock in the old East India Company, Phillips giving a memorandum in writing to assign the shares on demand. He neglected to do so, and, on March 15th 1697, took up the written memorandum, giving Pullen, instead of it, a bond, with a penalty of 500*l.*, in which Gardner became bound, to assign the three shares on or before a day named, together with 7*l.* 2*s.* 6*d.*, since added by the company

in a dividend. But the shares were not transferred, Phillips became bankrupt, and Pullen sued Gardner alone, getting judgment for 500*l.* and 53*l.* costs against Gardner, who then brought a writ of error, and after it was nearly spent, filed a bill in equity, paying into court 200*l.* and offering to pay Pullen out of it 145*l.*, which he alleged was the value of the shares at the time of executing the deed poll. Vernon, reporting this case, says: "The question was on what terms the plaintiff should be relieved against the penalty of the bond, whether to answer the value of the 300*l.* stock, according to what it was worth on the day on which he ought to have transferred it with interest from that time, or whether he should be obliged to transfer 300*l.* stock *in specie*. From this it is inferable, though not conclusively so, that the bill was an offer by Gardner either to respond in damages or transfer the stock, according as the court might decree, in which case the decision is hardly a precedent for a decree of specific performance of a contract to transfer stock, no question being made as to the right of the court to make such an order.

The plaintiff was decreed to transfer 300*l.* stock in a fortnight, and account for all dividends, since he ought to have transferred, and further that these dividends were to be paid Pullen out of the 200*l.* brought by Gardner into court, the residue of the 200*l.* to be paid to Gardner, in case he made the transfer of stock by the time set, but in default the 200*l.* were directed to be paid to Pullen.

From this examination of the cases it appears that while there is an agreement among the authorities that specific performance will not be decreed of contracts to transfer stocks which are always readily obtainable upon the markets, because an adequate remedy at law exists, yet they do not appear harmonious upon the question, to what stocks does this rule apply—at least so far as railway stocks are concerned?

The position of Mr. Justice MILLER, that contracts to convey railway shares are not specifically enforceable certainly appears reasonable, because it is commonly not difficult to obtain such stock upon the market, and the remedy at law would ordinarily be adequate. But in case of a contract to deliver an unusually large quantity of such stock, or even a small quantity of very desirable railway stock, it might be very difficult and even impossible to procure it upon the market. Take, for example, a contract to transfer a portion of Chicago street railway stock, but little of which is upon the market,

indeed, which is almost unpurchasable. The remedy at law would be in no wise adequate for breach of a contract to convey such stock. Should not the answer to the question, can specific performance be compelled of a contract to transfer shares of stock? depend upon the ascertainment of facts rather than upon the application of supposed legal principles relating especially to government stock, to railway stock, or to shares in purely private corporations? If the fact is that the stock, whether government, railway or private, may be readily obtained upon the market then the person promised the shares may go upon the market and buy them, and by an action at law recover damages against the promisor for breach of the contract. On the other hand, if the stock cannot thus readily be obtained upon the market then the contract should be enforced specifically in equity, for the remedy at law is inadequate, and this whether the stock be government, railway or private. The correct criterion appears to be the existence of an adequate remedy at law, and this depends upon a fact, namely, the purchasability, in the market, of the stock contracted for. And judges appear to go beyond the decisions when they make special rules as to the enforcement of contracts for governmental, railway or other stocks. Such rules are certainly not sustained by all the cases.

Private corporation stock.—With reference to stocks in purely private corporations,—banking, mining, manufacturing, and commercial companies—the distinction between shares and the certificates or other evidences thereof is taken in at least two cases. The first is *Mechanics' Bank v. Seton*, 1 Pet. 300. Lynn, as trustee for the Setons held, in his own name, certain shares of stock in the Mechanics' Bank. He was ready and willing to convey it to the Setons' guardian, but the bank refused to permit the transfer, alleging that it had a lien on the stock for a debt due it from Lynn. The Setons brought suit in equity against the bank to compel it to permit the transfer on its books. Mr. Justice THOMPSON, said: "If this had been a bill filed against the bank to compel a specific performance of any contract entered into with it, for the sale of stock, it might then be urged, that compensation for a breach of the contract might be made in damages; and that the remedy was properly to be sought in a court of law. But the bill does not set up any contract between the complainants and the bank; nor does it seek a specific performance of any express contract whatever, entered into with the bank. It only asks that the bank may be

compelled to open its transfer book, and permit Adam Lynn to transfer the stock. By the charter and by-laws of the bank, such transfer could only be made upon the books of the bank; and it was by their consent alone that this could be done. Although it might be the duty of the bank to permit such transfer, it would be difficult to sustain an action at law for refusing to open its books and permit the transfer. Nor have the appellants (the bank) shown such a claim to the stock as authorizes the court to turn the appellees round to their remedy at law against Lynn, admitting they might have it. At all events the remedy at law is not clear and perfect, and it is not a case for compensation in damages but for specific performance, which can only be enforced in a court of chancery."

It was also decided that it was unnecessary to make the trustee, Lynn, a party, and further that the bank, having notice of the trust, had no lien upon the stock which was the subject thereof, for the debt due it from Lynn.

The other case is that of *Burrall v. Bushwick Railroad Co.*, 75 N. Y. 211, wherein it was admitted that under some circumstances a corporation (in this case a railway company) is compellable to issue certificates of stock, but it was denied that it could be compelled to issue shares of its stock. "A corporation," said Judge FOLGER, "cannot issue and deliver a share of its capital stock. By the joint action of the corporation and the subscriber for its stock, he may become the owner of a given number of shares thereof but not in such sense as that he may take away those shares out of the common corporate fund. The capital stock is that money or property which is put into a single corporate fund by those, who by subscription therefor, become members of the corporate body. That fund becomes the property of the aggregate body only. A share of the capital stock is the right to partake, according to the amount put into the fund, of the surplus profits of the corporation and ultimately on the dissolution of it, of so much of the fund thus created, as remains unimpaired and is not liable for debts of the corporation. Such a right may be created as stated. But such a right, that is, such a share cannot be issued and delivered by a corporation, continuing in legal existence and carrying on the business for which it was formed. A demand that it deliver a share of the corporate fund, is to ask of it something which it has not the power to do and which it will

not be compelled to do by judgment, that is to say, upon the state of facts set up in this complaint. It cannot take from the capital stock, the corporate fund, a part or parts thereof, equal in number to the shares or rights therein claimed by the plaintiff, and hand those parts to him ; nor can it, on the facts shown by this complaint, now create the right which those shares represent. Those shares are intangible, and rest in abstract legal contemplation. It has been said that they are not a species of property that can be transferred by delivery, and that the assent of the owner to part with it must be expressed in writing : *Davis v. Bank of England*, 2 Bing. 393 ; *Dunn v. Com. Bank of Buffalo*, 11 Barb. 580. It is not needful that we say in this case that the rule goes to that extent ; the saying is cited to point our remark, that the share itself cannot be issued and delivered as a physical act, which is what the prayer for judgment literally taken asks for : " *Burrall v. Bushwick Railroad Co.*, 75 N. Y. 211, 216 ; and, see *Hardenberg v. Bacon*, 33 Cal. 356.

But the general rule is well established that a contract to transfer shares or stock in a purely private corporation or joint stock company will be specifically enforced. The reason is that damages at law do not furnish an adequate remedy for a breach of such contract. Thus, speaking of mining stocks, the Supreme Court of California, says : " In the peculiar condition of business and mining operations in this state, where numerous mining and other corporations are in existence, whose stock is often of fluctuating and uncertain value, and where certain kinds of stock have a peculiar value to those acquainted with their affairs ; where the market value of stocks if any they have is often difficult to substantiate by competent evidence, and where the risk of personal responsibility of individuals and corporations is so great, courts should be liberal in extending the full, adequate and complete relief afforded by a decree of specific performance." *Treasurer v. Commercial Mining Co.*, 23 Cal. 390 ; see *True v. Houghton*, Sup. Ct. of Colo., 4 Leg. Adv. 108. And Mr. Justice MILLER, of New York, says : " It is easy to see that a party may have become the owner or purchaser of stock in a corporation, which he desires to hold as a permanent investment, which may be at the time of but little value, in fact without any market value whatever, and its real worth may consist in the prospective rise which the owner has reason to anticipate will follow from facts within his knowledge.

To say that the holders shall not be entitled to the stock, because the corporation, without any just reason, refuses to transfer it, and that he shall be left to pursue the remedy of an action for damages in which he can recover only a nominal amount, would establish a rule which must work great injustice in many cases and confer a power on corporate bodies which has no sanction in the law. A court of equity will enforce a specific performance of a contract for the sale of real estate, and compel the execution of a deed by the vendor to the vendee, although an action at law may be brought to recover damages for the breach of the contract. Such a case bears a striking analogy to the one now presented, and the same principle is manifestly applicable where the remedy at law is inadequate to furnish the proper relief:” *Cushman v. Thayer Mfg. Co.*, 76 N. Y. 368.

Another case, *White v. Schuyler*, 1 Abb. Pr. (N. S.) 300; 31 How. Pr. 38, decides that specific performance of an agreement to transfer stock in a private company may be decreed, “1. Because the parties evidently contemplated and especially contracted for a reconveyance of the stock. 2. Because, as well on account of the uncertain value of the stock in the market and the infrequent sales it, as the varying character and success of the business which the stock represented, it was difficult, if not impossible, to do justice between the parties in an award of damages. These are controlling reasons in equity for specific performance:” citing, *Phillips v. Berger*, 2 Barb. 609; 2 Story’s Eq., tit. *Specific Performance*, sects. 716, 718; *Seymour v. Delancy*, 6 Johns. Ch. 222; s. c. 3 Cow. 445.

After an assignment of bank stock, the bank, upon the application of the *owner*, is bound to allow the transfer to be made on its books, and to issue a new certificate, unless restrained by the order of a court of competent jurisdiction: *Purchase v. N. Y. Ex. Bank*, 3 Robt. 164.

A bank which has permitted a transfer of stock owned by a stockholder upon a forged power of attorney and has cancelled the original certificates, may be compelled to issue new certificates, and if it has no shares which it can so issue, to pay the value thereof: *Pollock v. The National Bank*, 7 N. Y. 274. Commenting upon this case, MILLER, J., in *Cushman v. Thayer Mfg. Co.*, 76 N. Y. 369, says: “If in such a case new certificates may be decreed to be issued, surely it should be done when the right of the

owner is entirely clear. The action was of an equitable character, and the principle decided recognises the right to compel a transfer of stock by the bank." See also *Pollock v. National Bank*, 7 N. Y. 274, and *Johnson v. A. & S. Railroad Co.*, 54 Id. 416.

Other cases decreeing specific performance of private stock contracts are *Charter v. S. F. S. R. Co.*, 19 Cal. 219; *Colt v. Netterville*, 2 P. Wms. 304; *Hardenbergh v. Bacon*, 33 Cal. 356; *Todd v. Taft*, 89 Mass. 371; *Paine v. Hutchinson*, L. R., 3 Ch. 388; L. R., 3 Eq. 257; *Shaw v. Fisher*, 2 DeG. & Sm. 11; *Wynne v. Price*, 3 Id. 310; *Walker v. Bartlett*, 18 C. B. 845; *Oriental Inland S. Co. v. Briggs*, 2 John. & Hem. 625; *Withy v. Cottle*, 1 Sim. & Stu. 172; but see *Ferguson v. Paschall*, 11 Mo. 287; *Noyes v. Marsh*, 123 Mass. 286; *Dorison v. Westbrook*, 5 Vin. Abr. 540; *Jones v. Newhall*, 115 Mass. 244.

Trust.—Especially in cases of trust will specific delivery by the trustee of the stock be decreed. Thus where it had been mutually agreed between A. and B. that A. should subscribe in the name of B. for five shares of the capital stock of a new bank about to be distributed, and that all the shares allowed on such subscription beyond what B. could pay for, should be paid for by and belong to A. Accordingly A. subscribed for five shares in B.'s name. They were allowed and A. paid the first instalment from his own funds. B. then declared her inability to pay for any of such shares, and A. paid the subsequent instalments. On a bill in chancery by A. against B.'s administrator for a transfer of these shares, *Held*, that by this transaction a trust had been created which equity would enforce, and the transfer was decreed: *Cowles v. Whitman*, 10 Conn. 123. See also, *Ferguson v. Wilson, infra*.

In another case plaintiff, upon request of defendant, advanced a sum of money to the latter by payment to his agent, as a subscription to be used to buy the stock and bonds of a company. It was decided that the agent was authorized to receive the money, and that defendant was bound thereby; that a trust was created involving an obligation to use the funds to buy the stock for which they were subscribed, and that defendant could not avoid this obligation by showing that he chose to use his own money and purchase for himself; and that plaintiff was entitled to have, out of defendant's stock and bonds, the portion which fell to him according to his subscription: *Johnson v. Brooks*, 46 N. Y. Sup. Ct. 13.

One Draper transferred eighteen shares of stock in the Hardy Machine Company to Hardy, and took back a sealed agreement for their reconveyance on demand in writing. Hardy transferred eight of those shares, in his lifetime, to a third person, at a time when he (Hardy) held ninety-two shares in his own right, and at his death he held one hundred and thirty-three shares of stock in the same company, and his estate was rendered insolvent. It was decided that the transfer and agreement created a trust in Hardy for the eighteen shares to be re-transferred to Draper on demand in writing; that the transfer by Hardy of the eight shares was in violation of his trust, and equity would require him to replace them, and, as he held a sufficient number of other shares at the time of the conveyance and at the time of his death, equity would treat him as holding them for Draper, and the same result would follow if the agreement was treated as a contract by Hardy to convey eighteen shares to Draper on demand, as they were fully paid for; and that Draper's remedy at law is inadequate, because of the insolvency of Hardy's estate: *Draper v. Stone*, 71 Me. 175. See also *Forrest v. Elwes*, 4 Ves. 497; *Tyfe v. Swaby*, 16 Jur. 49; *Stanton v. Percival*, 5 H. L. Cas. 257.

But in another case the plaintiff bought of a member of a firm, shares of stock in a corporation and took from the firm a power of attorney authorizing him to procure a transfer of the shares on the books of the corporation. The firm had at the time a large number of shares standing to its credit on the books of the corporation. The plaintiff delayed for some months to present his power of attorney to the corporation, and in the meantime the firm sold all of its shares to other persons, who obtained certificates from the corporation. It was held that the plaintiff was not entitled in equity, as against a partner who had no knowledge of the transactions, to a decree for the delivery to him of a certificate of the shares of stock, which had risen in value, but was entitled to a decree for the money he had paid, with interest: *Wonson v. Fenno*, 129 Mass. 405.

Assessments or "calls."—Several cases have arisen from the refusal of a vendee of shares to accept them and contribute in response to "calls" by the company.

The plaintiffs, dealers in shares, contracted to sell to the agents of the defendant, shares which they had purchased from, and which remained registered in the name of, C. On the settling day the

agents of the defendant gave his name, as principal, for insertion in the deeds of transfer. Transfers executed by C. to the defendant were delivered to defendant's agents who paid for the shares out of money given to them by the defendant. The defendant refused to execute deeds and to procure their registration, on the grounds that he told his agents that he intended to resell without taking a transfer, and that they had given his name without authority. Five months after the sale, the company was ordered to be wound up, and on bill for specific performance and indemnity (filed before the winding up), to which C. was not a party, it was decided that plaintiffs were entitled to a specific performance, and that defendant should execute transfers and procure his name to be registered: *Paine v. Hutchinson*, L. R., 3 Eq. 257; affirmed L. R., 3 Ch. 388.

Again, on the instructions of W., shares in a company subsequently wound up were purchased for him by a broker, who, on the settling day, also on the instructions of W., gave the name of G., as a purchaser, and the deeds of transfer were made out in G.'s name and delivered to him for execution, and he, for some time, retained possession of and dealt with them. W. informed G. that he had passed his name as transferree, and had also passed a check on the company's bankers for the purchase-money to the debit of his firm. G. took no step to inform the vendor that he did not assent to the contract, though he did express his dissent to W. It was decided that the vendor was entitled to a decree for specific performance against G.: *Shepherd v. Gillespie*, L. R., 5 Eq. 293.

Refusal of company to accept transferree as a shareholder.—Other cases are complicated by the refusal of the company to accept as a shareholder, the vendee against whom specific enforcement is sought. One Bermingham filed a bill to compel Sheridan specifically to perform his contract to purchase the former's stock in the Waterloo Life, &c., Assurance Company. The company, which was in process of winding up, was brought into court to compel it to relieve Bermingham and substitute Sheridan as a contributory, the directory having refused to accept Sheridan as a shareholder. The Master of the Rolls said: I can well conceive that a case of this nature might exist. A purchaser might say to a vendor, 'I will buy your 1000 shares in this company; if the directors do

not choose to assent to my being put on the list of shareholders, we cannot compel them to do so; nevertheless, as between ourselves, there shall be this contract: we will act exactly as if the shares had been sold to me, and I had been accepted as a shareholder. You shall pay me all the future dividends, and I will pay every future call and indemnify you from every future liability.' That might be a perfectly good contract as between the contracting parties, though it would affect no one else, and I at one time thought it might have been the case here, but on referring to the evidence I do not find anything which indicates such a contract." And it was decided that the directors, who had power, under the charter, to reject a person from becoming a shareholder, and whose approval was necessary to constitute a complete and valid sale of shares from a shareholder to a stranger, having refused to accept Sheridan as a shareholder, the contract could not be specifically enforced: *Birmingham v. Sheridan*, 33 Beav. 660.

In another case the company had not the power of refusing to accept a person as shareholder which it was supposed to possess.

Poole sought specific performance of Middleton's contract to transfer to him certain shares of stock which Middleton refused to transfer because the directors of the company, acting under a rule "that no shareholder shall be at liberty to transfer his or her share or shares, *except in such manner as the board of directors shall approve*," not only refused to furnish a form of a transfer, but also refused the transfer proposed. Nevertheless specific performance was decreed, it being held that the rule gave the directors control only of the manner of the transfer, and as to this it was said that the directors could not exercise an arbitrary and unreasonable will or reject the mode of transfer in one instance which they approved and allowed in other cases. But Sir JOHN ROMILLY, M. R., said: "The clause does not say that no shareholder shall be at liberty to enter into any contract for the sale of his shares except with the consent of the directors, or until such contract has been previously submitted to and approved of by the board of directors, who shall have power to decide as they think fit. If there was any such provision as that in the deed of settlement, however singular it might appear, I could not say that the contract was a valid contract until it had been approved of by the persons whose previous consent was, by the stipulation, rendered necessary:" *Poole v. Middleton*, 29 Beav. 650.

Nor can the company prevent a transfer of stock made merely to increase the voting power of the transferee. Thus in *Moffatt v. Farquhar*, L. R., 7 Ch. Div. 591, by the company's deed of settlement, no shareholder was to have more than twenty votes, however large the number of shares held, and the directors had power to approve or disapprove of any person proposed by a shareholder as a transferee of his shares. A difference arose among the shareholders as to the management of the company and plaintiff, a large shareholder, transferred some of his shares to one person for value, and other shares to another person as trustee for himself, in order to increase his voting power. The directors refused to approve of the transfers, not from any personal objection to the transferees, but on the ground that the transfers were colorable and were intended to increase the votes of the transferee. The court decided that the company was not a mere partnership, but came within the laws applicable to joint stock companies, and that the directors had no power to refuse a transfer, which was a right of property, except upon personal objection to the transferee. They were therefore ordered to approve the transfers. See also, *Pender v. Lushington*, L. R., 6 Ch. Div. 70, and see also, *Foll's Appeal, supra*.

Conclusion.—Finally, the law as to the specific enforcement of contracts to transfer stock appears to be this: Specific performance of such contracts can be compelled in equity in all cases where a breach thereof is not adequately remediable at law, and this is believed to be true whether the stock be government, railway, mining, manufacturing, or commercial, in brief, whether it be public or private. As to government stock the remedy at law is ordinarily adequate, since such stock is readily purchasable upon the market and damages for a breach of a contract to convey it can be accurately measured and awarded at law. Equity, therefore, has generally refused specifically to enforce contracts to transfer government stock. But it is conceived that equity would compel specific performance of such a contract if a case should arise in which damages at law were clearly inadequate, or impossible of ascertainment, as they would be, if there was none of the stock for sale upon the market—a state of things unlikely of occurrence. The same opinion is entertained as to railway stock. Especially will a specific delivery of any stock be decreed against a trustee.

But it is essential that there be a contract to transfer the stock, and it must not be unconscionable, tainted with fraud, or against public policy, else specific performance will be refused. So also will it be refused if the contract to transfer is conditional, and the condition or contract upon which it depends has not been performed. And the opinion is ventured that while contracts to convey shares in private companies are commonly specifically enforced in equity, yet, if a case should arise wherein the stock, although private, was readily purchasable at well-known prices, by reason of which damages at law would constitute an adequate remedy, then equity should refuse specific enforcement of a contract to transfer such shares.

ADELBERT HAMILTON.

Chicago.

RECENT ENGLISH DECISIONS.

House of Lords.

THE SINGER MANUFACTURING CO. v. LOOG.

A trader has a right to make and sell machines similar in form and construction to those made and sold by a rival trader, and in describing and advertising his own machines, to refer to his rival's machines and his rival's name, provided he does this in such a way as to obviate any reasonable possibility of misunderstanding or deception.

APPEAL from a decision of the Court of Appeal, reported Law Rep., 18 Ch. Div. 395. The facts are sufficiently stated in the opinion.

Aston, Q. C., and Benjamin, Q. C. (Rigby, Q. C., and B. Coleridge, with them), for appellants.

Webster, Q. C., Everitt, Q. C., and Abrahams, for respondents.

Lord SELBORNE, L. C.—The plaintiffs (appellants here) are the same American company who were appellants in the case of “*The Singer Manufacturing Co. v. Wilson*,” decided by this House in 1877. They are the successors in business of an American manufacturer of, and dealer in, sewing machines, named Singer. Mr. Singer was not originally the inventor or patentee of any machines,